Nos. 25, 26

In the Supreme Court of the United States

OCTOBER TERM, 1941

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

VIRGINIA ELECTRIC AND POWER COMPANY

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE INDEPENDENT ORGANIZATION OF EMPLOYEES OF THE VIRGINIA ELECTRIC AND POWER COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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OPINIONS BELOW

The opinion of the circuit court of appeals (R. 1005–1019) is reported in 115 F. (2d) 414. The findings of fact, conclusions of law, and order of the Board (R. 952–980) are reported in 20 N. L. R. B. 911.

JURISDICTION

The decrees of the circuit court of appeals were entered on November 12, 1940 (R. 1019–1021).[1] The petition for writs of certiorari was filed on February 12, 1941, and was granted on March 31, 1941 (R. 1022–1023). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and upon Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there is substantial evidence to support findings of the Board that the Virginia Electric and Power Company dominated, interfered with, and supported a labor organization of its employees, and that the company discriminatorily discharged four of its employees in violation of the Act.

2. Whether, upon findings that the company has dominated, interfered with, and supported a labor organization of its employees, and has entered into an agreement with that organization providing for a closed shop and a check-off of union dues, and

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[1] The decrees were entered in two distinct proceedings for review of the Board's order, instituted, respectively, by the Virginia Electric and Power Company and The Independent Organization of Employees of the Virginia Electric and Power Company, a labor organization found by the Board to be company-dominated (R. 981–996, 1000–1004). In its answer to the petition of the company, the Board requested enforcement of its order (R. 996–1000).

pursuant to that agreement has deducted various sums of money from the wages of its employees and has paid those sums over to the labor organization, the Board may require, as affirmative action appropriate to effectuate the policies of the Act, that the company reimburse the employees for the amounts thus deducted from their wages.

3. Whether the company is responsible under the National Labor Relations Act for anti-union threats and surveillance of union meetings by a supervisory employee having power to assign work and discipline employees.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the appendix, *infra*, pp. 60–62.

STATEMENT

Upon the usual proceedings had pursuant to section 10 of the National Labor Relations Act, the Board issued its findings of fact, conclusions of law, and order (R. 952–980). The evidence relating to the unfair labor practices is detailed under the Argument (*infra*, pp. 12–28). Omitting jurisdictional findings, concerning which no question is here raised, the findings of the Board may be summarized briefly as follows:

For years prior to the events of this case, the Virginia Electric and Power Company, hereinafter called the company, had pursued a policy of op-

position to labor organizations.[2] Shortly after the enactment of the National Industrial Recovery Act in 1933, the president of the company made a speech to the employees denouncing organization among the employees as "entirely unnecessary"; in 1936 employees were interrogated concerning union activities; in 1937, employees were warned against participating in C. I. O. activities and their meetings were kept under surveillance; and the company utilized a labor spy until his death in 1937 (R. 959–960). On April 26, 1937, shortly after this Court had upheld the constitutionality of the National Labor Relations Act [3] and the A. F. of L. had begun efforts to organize the company's employees, the company posted on bulletin boards throughout its operations an appeal to the employees to bargain with the company directly, without the intervention of an "outside" union (R. 961–962, 964). When, in response to this bulletin, several groups of the company's employees submitted demands for better wages and working conditions, the company directed its employees to select representatives to attend meetings at which company officials would speak. The rep-

[2] In 1922, upon the refusal of the company to renew the terms of an agreement between it and a nationally affiliated union, that union called a strike among the company's employees; the strike was unsuccessful (R. 959). For 15 years thereafter, there was no labor organization among the employees (R. 959, 961).

[3] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, and companion cases, decided April 12, 1937.

resentatives were chosen, and on May 24 were assembled and addressed by high company officials who spoke of the desirability of forming a bargaining agency. In substance these speeches urged the employees to organize independently of "outside" assistance. By the speeches and through the method of calling and holding the meetings, the company gave impetus to and assured the creation of an "inside" organization. (R. 962–965, 967.)

After these addresses, meetings were held among the company's employees, often with the cooperation of supervisory employees; at the meetings the May 24 speeches were reported to the men who immediately voted to form an inside organization (R. 965, 967). These meetings were held on the premises of the company; subsequently the organizing committees also used company property and company facilities (R. 965–966, 967–968). By June 15 the committees had adopted the constitution of the Independent Organization of Employees of the Virginia Electric and Power Company (hereinafter called the Independent) (R. 966, 968).

While formation and organization of the Independent was proceeding, a company supervisor maintained surveillance over meetings of a competing C. I. O. union, and warned employees that participation in the C. I. O. would cause their discharge (R. 960). On June 1, an employee, Mann, who had openly protested against an inside union and advocated affiliation with a national labor or-

ganization, was discriminatorily discharged in violation of section 8 (3) and (1) of the Act (R. 969–970).

After adoption of the Independent's constitution, application cards were distributed throughout the company's system and many were signed during working hours (R. 966, 968). On July 19, the Independent notified the company that it represented a majority of the employees, and submitted a proposed contract. Negotiations were begun on July 30 and agreement was quickly reached; on August 5, the contract was formally executed. (R. 966–967.) The contract provided, *inter alia*, for a closed shop, check-off, and wage increase (R. 967). On August 20, pursuant to the check-off provision, the company paid $3,784.50 to the Independent, although it had not yet deducted the entire amount from the employees' wages (R. 967). On November 4, the date upon which the closed-shop provision became effective, the company discharged two employees, Staunton and Elliott, because they had refused to join the Independent (R. 970–973). In March 1938 it also discharged another employee, Harrell, a member of the Independent, because of his membership and activity in an outside union (R. 973–974).*

* The closed-shop provision permitted the employees to be members of other labor organizations (R. 878).

Upon the basis of these findings and the entire record in the proceeding, the Board concluded that the company had violated the prohibitions of section 8 (1), (2), and (3) of the Act (R. 977–978). Its order directed the company to cease and desist from its unfair labor practices and from giving effect to its contract with the Independent, to withdraw recognition from and disestablish that organization, to reinstate with back pay the four employees discharged, to reimburse each of its employees who was a member of the Independent in the amount of dues and assessments checked off his wages by the company on behalf of the Independent, and to post appropriate notices (R. 978–980).

Thereafter the company and the Independent filed separate petitions in the court below to review and set aside the Board's order (R. 981–996, 1000–1004). The Board answered, requesting enforcement of its order against the company (R. 996–1000, 1004–1005). On November 12, 1940, the court handed down its opinion and entered decrees denying enforcement to any part of the Board's order and completely setting it aside (R. 1005–1021).[5] On March 31, 1941, this Court granted the petition for writs of certiorari (R. 1022–1023).

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[5] The back-pay provisions of the Board's order provided also for reimbursement of governmental relief agencies. The Board has not sought review of the decrees insofar as they deny enforcement to the latter requirement. *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S. 7.

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In holding that the following findings of the Board are unsupported by substantial evidence:

(a) That the company dominated and interfered with the formation and administration of the Independent and contributed support to that organization;

(b) That the company discriminatorily discharged Mann, Staunton, Elliott, and Harrell;

(c) That in these and other respects the company interfered with, restrained, and coerced its employees in the exercise of their rights to self-organization.

2. In holding that the company was not responsible for the anti-union activities of Edwards, a supervisory employee.

3. In refusing to enforce and in setting aside the Board's order in its entirety, other than by eliminating the provisions for reimbursement of governmental relief agencies.

SUMMARY OF ARGUMENT

I

A. The Board's findings that the company dominated and interfered with the formation and administration of the Independent and contributed support to it in violation of section 8 (2) of the Act, and that the company, in this and other respects, interfered with, restrained and coerced its

employees in violation of section 8 (1) of the Act are supported by substantial evidence.

In broad outline the evidence shows: For many years prior to 1937 the company opposed the organization of its employees by labor unions. The company issued an announcement that self-organization was "entirely unnecessary"; it employed a labor spy; and it interrogated employees concerning union matters. In April 1937, after this Court had upheld the Act and the A. F. of L. had begun an organization campaign, the company posted a system-wide bulletin attacking "national" labor unions and appealing to the employees to deal directly with the company. In May 1937, the company called a meeting of representatives of the employees at which high company officials read a message urging the employees to "set up" a bargaining agency, to "select your own" officers and adviser, and to "adopt your own" bylaws and rules, and suggested that a wage increase might result from bargaining with such an agency if formed. The employee representatives reported the company proposal to their constituents at meetings held, with supervisory approval, on company time and property. The representatives thereafter repeatedly met on company property to establish the Independent, an "inside" organization. While the Independent was being formed, the company discharged, upon what was transparently a pretext, the employee who was most outspoken in op-

posing an "inside" union and in advocating affiliation with a national union; a supervisor also kept "outside" union meetings under surveillance, and warned employees interested therein that they would be discharged. Widespread solicitation of membership in the Independent followed on company time and property. After the successful conclusion of the membership drive, the company promptly entered into an agreement with the Independent providing, *inter alia*, for a wage increase, closed shop, and check-off of dues.

B. The evidence thus outlined supports the Board's ultimate findings that the company dominated, interfered with, and supported the Independent, and warrants the Board's order requiring the company to cease and desist therefrom and to disestablish the Independent. *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584; *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72; *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318; *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240.

C. The Board's order requiring the company to reimburse the employees for the Independent dues deducted from their wages by the company and paid over to the Independent is likewise warranted in the circumstances of this case. The company's closed-shop contract with the Independent unlawfully compelled all employees to be members of the Independent under penalty of discharge; the con-

stitution and bylaws of the Independent and the check-off agreement required that each Independent member assent to the deduction of dues by the company under pain of forfeiting his membership and hence his employment. These deductions were thus in no sense voluntary payments by the employees but constituted a forced tribute levied on them to maintain the company-dominated union. The employees suffered a loss in wages equal to the amount of the deductions. The loss should be borne by the company which caused it, rather than by the employees who were its victims. The Board's order effectuates the policies of the Act by restoring "the situation, as nearly as possible, to that which would have obtained but for the" company's unfair practices. *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194; *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S. 7; *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2), certiorari denied, 304 U. S. 576; *Agwilines, Inc.*, v. *National Labor Relations Board*, 87 F. (2d) 146 (C. C. A. 5).

II

The Board's findings that the company, in violation of section 8 (3) and (1) of the Act, discharged Mann and Harrell because of their union membership and activity, and discharged Staunton and Elliott because they refused to join the Independent, are supported by substantial evidence.

ARGUMENT

I

THE FINDINGS OF THE BOARD RELATING TO THE INDEPENDENT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE, AND THE ORDER BASED THEREON WAS PROPER

A. The Board's findings of fact are supported by substantial evidence

The Board found that the company had dominated and interfered with the formation and administration of the Independent and contributed support to it in violation of section 8 (1) and (2) of the Act (R. 967–969, 978). The court below accepted most of the critical subsidiary findings of fact upon which the Board rested its ultimate conclusion. It agreed with the Board that the company had been hostile to outside unions (R. 1008); that, in violation of the Act, Superintendent Bishop had interrogated employees concerning union organization and activities (R. 1008, 1018–1019); that the company's bulletin of April 26 and its message of May 24 "led to organizational activities on the part of the employees" (R. 1008); that the meeting of May 24 was called by the company in order to impress upon the employees the company's belief in "the desirability of their choosing agents for the purpose of collective bargaining" (R. 1009); that the Independent "came into being as a result of the May 24th meeting" (R. 1012–1013); and that "meetings of em-

ployees looking to the organization of the [Independent] were held on the company's premises, that its bulletin boards were used for posting notices of these meetings and its telephone between Richmond and Norfolk used in connection therewith, and that persons were solicited for membership in the [Independent] on the company's premises" (R. 1013). The court below, however, expressly rejected the Board's secondary findings and inferences relating to the April 26th notice (R. 1008–1009), the May 24th meeting (R. 1013–1015), the use of company premises and facilities (R. 1015–1016), and the progress and result of negotiations which began on July 30 (R. 1012). It minimized the significance of other findings and made findings of its own (R. 1008–1009, 1011, 1012, 1015). It concluded, therefore, that the Independent was the product of "free and untrammeled action of the employees and constitutes a bona fide bargaining agency for them, free of company domination or interference" (R. 1008).

We submit that the court was in error and that the Board's ultimate findings of domination, interference, and support were warranted, as the following review will demonstrate.

The company's hostility to self-organization.—The antecedent labor record of the company fully justifies the observation of the court below that "Prior to 1937, the attitude of the company had

not been favorable to labor organization" (R. 1008). From 1922 to 1937, the company's employees were unorganized (Bd. Exh. 3, R. 34–35). In 1933, the passage of section 7 (a) of the National Industrial Recovery Act, guaranteeing freedom of self-organization to employees, was promptly followed by a statement to the employees issued by the company's president, Holtzclaw,[6] announcing the company's view that "organization of our employees for any purpose * * * is entirely unnecessary" (R. 426–427, Resp. Exh. 36, R. 886). At the hearing, Holtzclaw admitted that "there never was any modification made" in this company policy (R. 428). The policy, moreover, was supplemented by active anti-union measures. From 1933 until his death in May 1937, the company employed through the Railway Audit and Inspection Bureau, a professional undercover operative who reported on labor matters directly to Division Superintendent Bishop (R. 56–59, 331–333, 370, 399–400, 402, 198–201). Upon learning of incipient union activity in 1936, Bishop himself undertook to add to this operative's information by systematically questioning a group of the company's employees concerning their

[6] Holtzclaw continued as president of the company throughout the period in question, and had plenary authority to deal with the company's labor problems (R. 30).

knowledge of and participation in this activity (R. 93, 400, 820–821).[7]

Against this background, the critical events in controversy occurred.

Events leading to the inception of the Independent: the notice of April 26, 1937, and the meetings of May 24, 1937.—Just as in 1933 and 1936 the possibility of self-organization had stimulated the company to take counter-steps (*supra*, pp. 11–15), so in 1937 local and national events calling attention to unionization found prompt company response. In March or April 1937, the A. F. of L. again initiated efforts to organize the company's employees (R. 428–429, 193)[8]; on April 12 this Court upheld the Act. The decision of this Court concededly "gave no intimation to [Holtzclaw's] mind of any change in the company's policy toward labor relations whatever" (R. 429–430), and on April 26 the company posted the follow-

[7] The lower court concurred (R. 1008, 1018–1019) in the Board's finding (R. 960) that Bishop's conduct violated section 8 (1) of the Act, but nevertheless held that this violation did not justify the issuance of a cease and desist order (R. 1019).

[8] In March 1937 an A. F. of L. organizer, Parker, telephoned a company superintendent, Davis, to ask for an appointment to discuss organization of a certain group of the employees; Davis immediately advised the company's vice-president of the Norfolk Division, Throckmorton, of the call, and Throckmorton in turn promptly relayed the information to President Holtzclaw (R. 350, 428–429).

ing statement on the bulletin boards throughout its enterprise (Bd. Exh. 3, R. 34–35)[9]:

> *To the Employees of the Company:*
>
> As a result of recent national labor organization activities and the interpretation of the Wagner Labor Act by the Supreme Court, employees of companies such as ours may be approached in the near future by representatives of one or more such labor organizations to solicit their membership. Such campaigns are now being pressed in various industries and in different parts of the country and strikes and unrest have developed in many localities. For the last fifteen years this company and its employees have enjoyed a happy relationship of mutual confidence and understanding with each other, and during this period there has not been any labor organization among our employees in any department, so far as the management is aware. Under these circumstances, we feel that our employees are entitled to know certain facts and have a

[9] Although the company had taken no such action upon the passage of the Act in 1935 (R. 449), the company purportedly felt it necessary to post the notice in 1937 because of "rumors" that the "employees wanted to know their status," and because the company thought it desirable to clarify the Act for the employees (R. 55, 430–431, 449–450). The record is barren of any evidence to show that any employee sought this "legal advice" from the company (cf. R. 634, 770) and, indeed, President Holtzclaw clearly indicated that the advice was unsolicited and was the company's own idea (R. 430–431, 449–450).

statement as to the Company's attitude with reference to this matter.

The company recognizes the right of every employee to join any union that he may wish to join, and such membership will not affect his position with the Company. On the other hand, we feel that it should be made equally clear to each employee that it is not at all necessary for him to join any labor organization, despite anything he may be told to the contrary. Certainly, there is no law which requires or is intended to compel you to pay dues to, or to join any organization.

This Company has always dealt with its employees in full recognition of the right of every individual employee, or group of employees, to deal directly with the Company with respect to matters affecting their interests. If any of you, individually or as a group, at any time, have any matter which you wish to discuss with us, any officer or department head will be glad, as they always have been, to meet with you and discuss them frankly and fully. It is our earnest desire to straighten out in a friendly manner, as we have done in the past, whatever questions you may have in mind. It is reasonable to believe that our interests are mutual and can best be promoted through confidence and cooperation.

(Signed) J. G. HOLTZCLAW,
President.

Holtzclaw admitted that in the notice "We simply wanted to tell our employees again just what we told them in 1933, * * *" (R. 430, cf. *supra*, p. 14). The Board found that this notice constituted "an appeal to the employees to bargain with the [company] directly, without the intervention of any 'outside' union" (R. 962; *infra*, pp. 30–31).

In response to the notice of April 26, requests for increased wages and improved working conditions, including one from a majority of the Norfolk transportation employees, were submitted to the company (R. 37–38, 40–41, 250, 316, 346–347, 463). Holtzclaw, however, declined to deal with these groups (R. 37–38, 463–464). Instead, on May 20, he called a meeting of some 40 superintendents and other officials and instructed them to request the employees to select representatives to attend meetings to be held on a later date at which they would be addressed by Holtzclaw at Richmond, and by another official at Norfolk (R. 37–40, 252–253, 317–318).

Accordingly on May 24, representatives selected by the employees pursuant to this company request attended meetings in the company's office buildings in Richmond and Norfolk (Int. Exhs. 20A, 20B, R. 914–915, 37, 69, 377, 660). After reference to newspaper accounts of strikes and disorders throughout the country, President Holtzclaw, at the meeting in Richmond, read the

following message as a statement of the company's position concerning union activities (Bd. Exh. 4, R. 822–823, 36–37, 69–70, 98):

> A substantial number of its employees representing various departments and various occupations have approached the Company with the request that the Company consider with them the matter of their working conditions and wages. *In other words, they have requested collective bargaining. The Company's position with respect to this was recently stated in a posted bulletin.*
>
> In a company such as ours, if an individual operator, for example, should ask for himself better working conditions or wages, this Company could not comply with his request without also making the same concessions to other similar operators. In such a case the operator who appealed individually would, as a practical matter, be bargaining collectively for all of his group, which is not the logical procedure.
>
> This Company is willing to consider the requests mentioned above but feels that, in fairness to all of its employees and to itself, it should at the same time consider other groups who have not yet come to it. If the approaching negotiations are to be intelligent and fair to all properly concerned, they should be conducted in an orderly way, and all interested groups should be represented in these discussions by representatives of their own choosing,

as provided in the Wagner National Labor Relations Act, which provides as follows:

"SECTION 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

The Wagner Act applies only to employees whose work is in or directly affects interstate commerce and to companies engaged in interstate commerce. Counsel for this Company advise us that in their opinion the provisions of the Act do not apply to local transportation employees, to gas employees in Norfolk, or to certain strictly local employees of the light and power department. In spite of this, the Company wants to make it perfectly clear that its policy is one of willingness to bargain with its employees in any manner satisfactory to the majority of its employees and that no employee will be discriminated against because of any labor affiliations he desires to make.

The petitions and representations already received indicate a desire on the part of these employees at least to do their own bargaining, and we are taking this means of letting you know our willingness to proceed with such bargaining in an orderly manner. *In order to progress, it would seem that the first step necessary to be*

taken by you is the formation of a bargaining agency and the selection of authorized representatives to conduct this bargaining in such an orderly manner.

The Wagner Labor Act prohibits a company from "dominating or interfering with the formation or administration of any labor organization or contributing financial or other support to it."

In view of your requests to bargain directly with the Company, and in view of your right to self-organization as provided in the law, *it will facilitate negotiations if you will proceed to set up your organization, select your own officers and adviser, adopt your own bylaws and rules, and select your representatives to meet with the Company officials whenever you desire.* [Italics supplied.]

Holtzclaw concluded his talk by stating that if a wage increase was agreed upon in future bargaining it would be made effective as of June 1, 1937 (R. 53, 435). In response to questions from the floor, the employees were told that they need join no labor organization, and were refused advice concerning the type of organization they should adopt (R. 44). Holtzclaw and the other company officials then left the auditorium after announcing, as they had prearranged to do (R. 385), that the employees were free to remain there to discuss the matter further (R. 45, 455). The Norfolk meeting was substantially identical to

that at Richmond (R. 256, 284–285, 340–341, 376–377, 385), except that Throckmorton, vice president in charge of the Norfolk Division (R. 32), who presided there, did not mention the possibility of any wage increase (R. 266).[10]

A considerable number of the employee representatives remained at both meetings (R. 586, 790–791, 741–742). At Richmond, after some discussion concerning the formation of an inside organization (R. 793), the representatives elected Holzbach, an employee, "general chairman to push this thing into an organization" (R. 790–791, 928, 745). At Norfolk the representatives decided to meet again on June 1 (R. 667, 678).

Upon the basis of this evidence the Board found that both through the contents of the company speech and the mechanics of the meetings, the company had at the May 24 meetings "urged its employees to organize and to do so independently of 'outside' assistance" (R. 965; *infra*, pp. 32-34).

The formation and organization of the Independent and the execution of the closed-shop and check-off contract.—Immediately following May 24, employee meetings, in the arrangement of which

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[10] Although the advisability of making the statement respecting a wage increase was considered by Holtzclaw and Throckmorton prior to the meeting, Holtzclaw had not made up his mind at the time Throckmorton left Richmond for Norfolk (R. 284–285, 435, 454–455). Since three Norfolk employees attended the Richmond meeting (R. 98), it is not improbable that the Norfolk employees, too, promptly learned of the possibility of a wage increase as of June 1.

supervisory employees cooperated,[11] were held upon company premises in virtually every department (R. 807–808, 587, 736, 742, 782, 795–796); many employees left their work in order to attend (R. 742–743, 761, 791, 796–798). At these meetings, after the representatives who were present at the speeches of May 24 reported the company's message (*ibid.*), the employees voted to create an unaffiliated organization and elected representatives to bring about its formation (R. 808, 587–588, 665, 727, 743–744, 754, 761–762, 782–783).[12]

On June 1, pursuant to a notification from Holzbach, who had been chosen "general chairman" on May 24, a meeting of representatives of

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[11] Superintendent of Distribution Crafton (R. 535) arranged to have the Norfolk linemen brought in so that they could hear their representative report to his department (R. 676). Superintendent Davis, of the Reeves Avenue plant in Norfolk, gave permission for the use of the company auditorium on May 27 (R. 727–728). Superintendent of Installation Walke in Richmond permitted the use of the Service Building for meetings of the line department and the engineering group during working hours, and held the linemen in the office so that they could attend (R. 742–743, 791, 797–798).

[12] Many of the employees who had been selected to hear the company's speeches of May 24 were reelected for the purpose of forming the inside organization (R. 109–110, 595, 710–711, 758, Int. Exh. 20A–B, R. 914–915, 660). Fourteen of the seventeen representatives who took part in the June 1 meeting at Richmond (*infra*, pp. 23–24) and seven of the nine Norfolk representatives at the first joint meeting on June 3 at Petersburg (*infra*, p. 24) had been previously designated as representatives to hear the May 24 message (Int. Exhs. 20A, 20B, 33, Bd. Exh. 19, R. 914–915, 929, 839, 660).

departments in the Richmond area was held in the auditorium of the company's service building (Int. Exhs. 32, 33, R. 928–931, 744–745). The assembled representatives constituted themselves a steering committee to form an organization without "outside aid or interference" and designated a committee to consult with a Norfolk committee on selection of a lawyer to draw up a constitution and plan of organization (*ibid.*) Simultaneously, a meeting of representatives of departments in the Norfolk area was held at the company's general office building at Norfolk (Int. Exh. 4, R. 889, 592). On June 3 committees from both Richmond and Norfolk met at the company's office building at Petersburg and appointed representatives to employ an attorney to draft a constitution and bylaws for a system-wide organization (Bd. Exh. 19, R. 839–841, 248, 124–125, 679–680, 697–698, 715).[13] An attorney was retained (R. 756, 766–767, 776) and on June 7, the Norfolk representatives again met in the company's general office building at Norfolk and, like the Richmond representatives, constituted themselves a steering committee for the formation of an unaffiliated system-wide organization (Bd. Exh. 20, R. 841–842, 680).

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[13] The proposal of one of the committeemen that they "procure counsel that is definitely partial to the general interests of labor" was overruled with the statement "that in Richmond the preference is for a lawyer who is neutral in every possible way" (Bd. Exh. 19, R. 839–840, 248).

The Richmond steering committee, in turn, met on June 9 and discussed the proposed constitution and bylaws prepared by the attorney; at this meeting it was decided that further meetings should not be held on the company's premises (Int. Exh. 35, R. 932–934, 746). The Norfolk committee, however, had no such scruples: In order to consider the proposed constitution and bylaws, it met on June 11 in the company's general office building (Int. Exh. 6, R. 889–890, 680–681, 707–708) and again on June 14 in the company's Reeves Avenue auditorium (Int. Exh. 31, R. 927–928, 723). On June 15 the Richmond and Norfolk steering committees, as well as representatives from other cities in which the company operates, met together off company premises and adopted a constitution and bylaws for the Independent (Bd. Exh. 36, R. 844–855, 247, Int. Exh. 22, R. 915–920, 681, 688–689, 746–747).

The Independent's membership campaign followed, with widespread solicitation on company time and property (R. 155–156, 193, 76–77, 184). Within less than two weeks, a majority of the employees had signed (R. 758, 778–779, 710).

Thereafter the Independent completed its organization by electing representatives to its permanent committees (Int. Exhs. 10, 16, R. 893–898, 605–606, 609, 651–652, 805). On July 19 the Independent submitted to the company a proposed contract embodying demands for a closed shop and the check-off of Independent dues (R. 260,

823–824, 900, 46–47, 611–612). At a bargaining conference with the company held on July 30, the company granted the demand for the check-off;[14] after discussion, the closed-shop request was put over to another session at which it too was granted (R. 297–299, 303–304, 345, Resp. Exh. 14, R. 875–876, 878, 268–269).[15] The company also granted a substantial wage increase retroactive to June 1, as had been promised by President Holtzclaw at the meeting on May 24 (Resp. Exh. 14, R. 878, 838, *supra*, p. 21). The agreement was reduced to writing and signed on August 5 (Resp. Exh. 14, R. 878, 268–269, Bd. Exh. 9, R. 826–839, 53); two weeks later the company anticipated the collection of Independent dues by paying to the Independent $3,784.50, although it had not at that time checked off the entire amount from the employees' wages (Bd. Exh. 53, R. 860, 779–780). On November 4, when the closed-shop provision went into effect, the company discharged two employees, Staunton and Elliott, because they refused to be-

[14] While a proviso was added that an employee might revoke his authorization at any time (R. 876, 299–300, 268–269), the proviso is admittedly meaningless (R. 300) since the company promptly thereafter entered into a closed-shop contract requiring all employees to become members of the Independent and the Independent's constitution and by-laws require its members to authorize the deduction of dues (Bd. Exh. 36, R. 855, 247).

[15] The closed-shop provision, which was to be effective in 90 days, provided that it should not affect the right of employees to join or remain members of other labor organizations (Resp. Exh. 14, R. 878, 268–269).

come members of the Independent (R. 172–173, 181, 267–268).[16]

Throughout the period in which the Independent was organizing, the company's attitude toward this inside organization differed sharply from that which it displayed toward outside unions. We have noted above the frequent meetings on company time, on company property, and with supervisory cooperation, which marked the Independent's genesis (*supra*, pp. 18, 22–25), as well as the extensive solicitation for membership which was conducted on behalf of the Independent on company premises during working hours (*supra*, p. 25); in addition, the Independent's organizers freely availed themselves of other company facilities.[17]

In contrast was the company's hostility to outside organizations. In March 1937, President Holtzclaw issued specific instructions prohibiting an A. F. of L. organizer at Norfolk from recruiting members on the company's premises (R. 428–429); in June 1937, when a C. I. O. union had

[16] The Board found that these discharges violated section 8 (3) and (1) of the Act (*infra*, pp. 52–53).

[17] The organizers used, without charge, the company's local and long distance telephone lines to transact their union business (R. 718–719, 720–721, 723, 762–763, 765–766, 772–773, 775). In addition to the meetings above described, other meetings looking toward organization of an inside union were held by the employees on company premises at Petersburg on June 2 (Int. Exh. 34, R. 931–932, 746, 754–755), and at Norfolk on June 4 and June 9 (R. 680, 718, 112).

begun to organize the Norfolk transportation employees, Edwards, a supervisor under Superintendent Bishop, maintained surveillance over the C. I. O.'s organizational meetings and warned employees that they would be discharged if they kept "messing with the C. I. O." (R. 161–164, 89, 119–120, 152–153, 233–234);[18] and on June 1, Superintendent Bishop discriminatorily discharged a Norfolk employee named Mann, after Mann had vigorously and publicly urged his fellow employees not to form an inside union, but, instead, to affiliate with a national labor organization.[19]

B. On these facts the Board properly concluded that the company dominated, interfered with, and supported the Independent, and in this way and others interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in section 7 of the Act, thereby violating section 8 (1) and (2)

The foregoing facts, which were found by the Board, are clearly supported by substantial evidence. Indeed, many of the evidentiary findings are undisputed, and were accepted by the court below. Upon these facts, the Board's ultimate

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[18] The court below held that the company was not responsible for Edwards' activities (R. 1018); we dispute this conclusion *infra*, pp. 37–38.

[19] We consider below the evidence supporting the Board's finding (R. 970) that Mann was discharged, in violation of section 8 (3) and (1) of the Act, "as a warning to other employees who might also desire the formation of an outside union" (*infra*, pp. 49–52).

findings (R. 960, 968–969) that the company violated the guarantees of section 7 of the Act and dominated, interfered with, and supported the Independent in contravention of section 8 (1) and (2) of the Act are fully supported since they are based upon reasonable inferences which were within the Board's specialized competence.

As in *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, "The question here is whether the Board was justified in concluding that Independent was not the result of the employees' free choice because the employer had intruded to impair their freedom" (p. 587). The determination of the occurrence of such intrusion "must of necessity be based on the existence of conditions or circumstances which the employer created or for which he was fairly responsible and as a result of which it may reasonably be inferred that the employees did not have that complete and unfettered freedom of choice which the Act contemplates" (p. 588).

The evidence shows that for a long period, the company's position, never modified, was one of outright hostility to free self-organization. It had utilized a labor spy; its supervisors had questioned employees concerning their union activities and affiliations; it had announced that self-organization was "entirely unnecessary" (*supra*, pp. 13–15). When the company's fifteen years of "happy relationship", free from unions, was threatened

by the appearance of an A. F. of L. organizer in March 1937, and, still more seriously, by the Act's being held constitutional by this Court, the company's reaction was prompt. On its own motion, without solicitation from any employees, the company undertook to "explain" to its employees what their rights were under the Act. The "explanation" took the form of the system-wide notices posted on the company's bulletin boards on April 26, 1937, concerning which the Board found (R. 962):

> On its face the bulletin reveals a marked bias against what it calls "national" labor organizations. It * * * implies that "strikes and unrest" are caused by the campaigns of such organizations, and stresses the "happy relationship of mutual confidence and understanding" which characterized the 15 years since its defeat of the Amalgamated in 1922. After brief lip-service to the rights guaranteed by the Act, it emphasizes the negative "right" of its employees to refrain from the exercise of those rights.

The notice was admittedly a repetition of the company's 1933 statement, which had been inspired by the National Recovery Act (*supra*, p. 18). More subtle than the blunt announcement in 1933 that labor organizations were superfluous, the 1937 notice was nevertheless cut from the same cloth. The only reference in the notice to the positive rights under the Act, the statement that the com-

pany "recognizes" the employees' rights to join any union of their choice,[20] was immediately balanced by the emphasis upon the negative "right" to refrain from joining any union and to refrain from paying dues. For the rest, the notice was weighted against labor organizations. Employees were invited to "deal directly" with the company under conditions "as they always have been" and as "in the past." In contrast to this suggested course, organizing efforts of outside unions were pictured as leading to "strikes and unrest" rather than to the "happy relationship" existing in the company during the period when there were no labor organizations. The spectre of compulsion to join unions and to pay dues, a warning not without its irony when viewed in the light of the subsequent conduct of the company (*infra*, pp. 38–39), was raised.

This notice warranted the Board's finding (R. 962) that it was "an appeal to the employees to bargain with the [company] directly, without the intervention of any 'outside' union."[21]

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[20] Even this "recognition" was, in respect of many of the employees, soon modified from a right into a company-granted privilege, since on May 24, the company announced its counsel's opinion that the Act did not apply to certain groups of its workers (*supra*, p. 20).

[21] Compare the "Sasser statement" in *System Federation No. 40* v. *Virginian Ry. Co.*, 11 F. Supp. 621, 624–625, 633, affirmed, 84 F. (2d) 641 (C. C. A. 4), affirmed, 300 U. S. 515; cf. *National Labor Relations Board* v. *Elkland Leather Co.*, 114 F. (2d) 221, 223, 224 (C. C. A. 3), certiorari denied, 311 U. S. 705; *Valley Mould & Iron Corp.* v. *National Labor Relations Board*, 116 F. (2d) 760, 766

It is in this setting that the subsequent meetings of May 24, which followed in less than a month and which were expressly convened by the company in order to bring about the selection of a bargaining representative (*supra*, pp. 18–21), must be evaluated. For, whatever the form of words addressed by the company to the men on May 24, the employees could not fail to consider and interpret those words in the light of the company's hostility to national labor organizations; against this background the employees could scarcely fail to understand that the company, in initiating selection by them of a bargaining representative, intended that they select only an "inside" organization (cf. R. 71, 100). The court below, indeed, agreed that "the employees may have gathered that impression from past dealings with the company" (R. 1014).

But even the form of words used by the company at the May 24 meetings made clear the company's desire for an inside union. At these meetings, composed of employee delegates selected upon the company's request (*supra*, p. 18) and convened by the company for the express purpose of bringing about the selection of a bargaining representative, high officials of the company read a message

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(C. C. A. 7), certiorari denied, 313 U. S. 590; *American Enka Corp.* v. *National Labor Relations Board*, 119 F. (2d) 60, 62–63 (C. C. A. 4); *National Labor Relations Board* v. *Blossom Products Corp.*, 121 F. (2d) 260, 261–262 (C. C. A. 3).

whose opening paragraph referred approvingly to the company's April 26 bulletin attacking national unions; the message suggested that the delegates undertake "the formation" of a bargaining agency; and it urged them to "set up" an organization, to "select your own" officers and adviser, and "adopt your own" bylaws and rules (*supra*, p. 21). Clearly the Board could properly find (R. 965) that at the May 24 meetings the company "urged its employees to organize and to do so independently of 'outside' assistance." [22]

The conclusion that by the May 24 meetings the company canalized the employees' choice in the direction of its desired form of organization is reinforced by still other considerations. The message was delivered on company premises by high company officials to a small group of delegates chosen upon the company's request; the company officials, as they had prearranged, informed the selected delegates that they could remain in the auditoriums for further discussion of the matter (*supra*, pp. 21–22); and at Richmond the company hastened action by its promise in respect of a

[22] Indeed, even if the company's expression of preference had been less patent, and more subtly put, the conclusion would be no different: as this Court has said, "Intimations of an employer's preference, though subtle, may be as potent as outright threats of discharge." *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 600; cf. *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 78.

wage increase (*supra*, p. 21). Thus by arranging to have the movement for organization of the employees stem directly from an appeal by company officials whose opposition to national labor organizations had long been made clear, by having the officials make the appeal at a time when no competing representatives of outside organizations were present, and by providing a setting in which the delegates, urged by the company to remain, could proceed immediately to "set up" the organization, the company assured creation of an organization of its own, rather than of the employees', choice. As the Board found, "The [company's] actions converted the delegates, isolated from their constituents and under the immediate influence of the officials, into virtual representatives of the employer among the employees who had elected them" (R. 965); "the mechanics of the meetings of May 24, no less than the speech itself, assured the formation of an 'inside' union" (*ibid.*).

Nor did the company's interference end when it had set its employees' feet upon the path of "inside" unionism. Throughout the Independent's organizational period the company in many ways multiplied the indications that it favored an inside union and that it wanted the employees to organize it and become members. Liberal use of company property and facilities was made by the organizers (*supra*, pp. 22–25, 27); supervisors cooperated in arranging the organization meetings,

and for attendance by the employees during working hours (*supra*, pp. 22–23);[23] and the company promptly promised to furnish the organizers with a list of all employees (Bd. Exhs. 39, 40A, 40B, R. 855–858, 457–459). President Holtzclaw's promise with respect to a wage increase was used as an argument in favor of forming the Independent (R. 100, 796–797, cf. R. 71). Widespread solicitation of members on company time and property ensued (*supra*, p. 25). In the midst of the campaign, Mann, a most outspoken opponent of inside unions, was discharged (*infra*, pp. 49–52),[24] and Supervisor Edwards spied on C. I. O.

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[23] There is also evidence, upon which the Board made no finding, by a number of witnesses (though denied by Superintendent Bishop (R. 820, 391, 396)), that in April and May 1937, Bishop had urged the men to form an inside organization after warning against the C. I. O., and had given one of them a booklet describing a company union plan (R. 63–64, 71, 83, 96–97, 104–106, 162, cf. R. 403). The court below agreed that there was "some evidence that * * * Bishop * * * encouraged another organization," but said that his effort "came to naught and impeded rather than helped the organization of the" Independent, and so had no tendency "to establish domination and interference" in connection with the Independent (R. 1015). But Bishop's activities cannot thus lightly be dismissed simply because the company promptly thereafter absorbed the movement on a broader basis; Bishop's action clearly helped to make the ground ready for the entirely consistent action of the company.

[24] This Court has recognized that a well-timed discharge of an "outside" union sympathizer may constitute support of an "inside" union. *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 589, 598, 599; see also *National*

meetings and threatened employees with discharge if they continued "messing with the C. I. O." (*supra*, p. 28). That these constituted powerful forms of interference with, and support of, the Independent is not open to debate. *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 77–78; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 598–599; *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 333–338.

The company cannot avoid responsibility for these activities on the plea of ignorance or lack of consent. In the light of the widespread and public use of company facilities and property,[25] often with the cooperation of supervisors (*supra*, pp. 22–25, 27), the Board's inference (R. 968) that the company gave "tacit, if not express, consent to the use of its premises" is warranted. Cf. *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 592.[26]

Labor Relations Board v. *American Potash & Chemical Corp.*, 98 F. (2d) 488, 495 (C. C. A. 9), certiorari denied, 306 U. S. 643.

[25] Local newspapers carried advance notices of the meetings on company property, prominently mentioning their place (Resp. Exh. 11, R. 862, 863, 865, 866, 247–248).

[26] The court below minimized the significance of the solicitation on company premises for the Independent on the ground that it was balanced by like solicitation on behalf of outside unions (R. 1016). But even if this finding were within the court's competence, the evidence shows that while there was some solicitation for outside unions on company

Similarly, the company is responsible for the support rendered to the Independent by the anti-C. I. O. activities of Supervisor Edwards.[27] Edwards was one of 10 supervisors having authority over 280 employees (R. 386); his authority included the power to assign work and to discipline employees (R. 153). His anti-union actions were consistent with the company's policy of opposition to outside unions, and with the anti-union activities of his own direct superior, Superintendent Bishop (*supra*, pp. 14–15, 35). In these circumstances the company's responsibility for Edwards' campaign against the C. I. O. is settled by the governing decisions of this Court. *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 79–81; *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 520–521; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 599.[28]

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property (R. 178–179, 670, 684, 710, 730–732) it was occasional and scattered in comparison with the solicitation for the Independent; one Independent solicitor, for example, testified that he had openly conducted his drive on company time and property for over a month with no reprimand from the company (R. 76–77). As in the *Link-Belt* case the activity on behalf of the outside unions did not have "the magnitude and intensity of the acts of solicitation on company time by" the Independent (311 U. S., at 590).

[27] The court below held to the contrary on the ground that Edwards occupied a "minor supervisory position" and that his activities were "contrary to the policy of the company and were clearly nothing more than the utterance of his own individual views" (R. 1018).

The conclusion that the Independent was brought into being with the company's vigorous aid in order to defeat genuine self-organization is further reinforced by the striking fact that the company, after brief negotiations, accorded to the Independent a closed shop and the check-off of union dues (*supra*, pp. 25–26). The promptness with which the company granted these concessions, and, indeed, their being granted at all, are significant factors evidencing the company's desire to aid the Independent.[28] It is recognized that these provi-

[28] It is immaterial, even if true, that Edwards and other supervisors had received instructions to refrain from interference. The mere issuance of such instructions does not exhaust the employer's duty under the Act; he must, at the least, communicate his neutrality to the employees generally (*H. J. Heinz Co.* v. *National Labor Relations Board*, 110 F. (2d) 843, 847 (C. C. A. 6), affirmed, 311 U. S. 514, 519–521; *Oughton* v. *National Labor Relations Board*, 118 F. (2d) 486, 489 (C. C. A. 3), pending on petition for certiorari, No. 98, this Term), or take some other "effective means to stop repeated violations of the Act" (*Swift & Co.* v. *National Labor Relations Board*, 106 F. (2d) 87, 93 (C. C. A. 10)). To the extent that the employer is in a position to "secure any advantage" from the interfering practices, he is responsible for them even if he "did not authorize or direct them." *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S., at 520; the *Machinists* case, *supra*, at 80–81; the *Link-Belt* case, *supra*, at 599.

[29] A closed shop is often the last step in the familiar company union pattern. Joseph Rosenfarb, *The National Labor Policy* (1940), pp. 256–257.

sions are usually opposed by employers in dealing with a *bona fide* union.[30] In the instant case, the company, in its April 26 notice dealing with outside unions, had found it expedient to emphasize the fact that the employees were not, under the Act, compelled to join unions or to pay dues (*supra*, pp. 17, 31). Yet it quickly agreed to subject the men to precisely those requirements in the case of the inside Independent. The conclusion is compelling that the company thus sought to entrench the Independent by insuring universal membership and a guaranteed source of income. The Board has often held that the grant of a closed shop or a check-off in circumstances such as these constitutes the interference and support proscribed by the Act.[31]

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[30] According to the National Industrial Conference Board, "There is no questioning the fact that an overwhelming majority of executives who determine the policies of their companies are strongly opposed to the closed shop principle." National Industrial Conference Board, *Studies in Personnel Policy, No. 12, The Closed Shop* (March 1939), p. 11. "The average employer's opposition to the check-off is even more intense than to the closed shop." Robert R. R. Brooks, *When Labor Organizes* (1937), pp. 18–19.

[31] E. g. *Matter of Clinton Cotton Mills*, 1 N. L. R. B. 97, 106–112; *Matter of Ansin Shoe Mfg. Co.*, 1 N. L. R. B. 929, 935–937; *Matter of Highway Trailer Co.*, 3 N. L. R. B. 591, 609–610; *Matter of Titan Metal Mfg. Co.*, 5 N. L. R. B. 577, 585, enforced, 106 F. (2d) 254 (C. C. A. 3), certiorari denied, 308 U. S. 615; *Matter of Heller Bros. Co. of Newcomerstown*, 7 N. L. R. B. 646, 652, 656; *Matter of Lone Star Bag and Bagging Co.*, 8 N. L. R. B. 244, 253–254; *Matter of Jen-*

But without reference to the details of the company's activities, it is submitted that the entire sequence of events viewed in the large furnishes ample support to the Board's conclusion of interference, domination, and support. For the short answer to any assertion that the Independent was not employer-supported or interfered with is that from the beginning, even apart from the precise contents of its messages and notices, the company, not the employees, played the dominant role. The Independent was not a spontaneous movement of the employees; the stimulus, on the contrary, flowed solely from the company. The movement indisputably had its beginnings in the company's unsolicited notices of April 26. When the response to these notices indicated the employees' wish for organization and collective bargaining, the company again intruded to assure itself that any organization formed would take the shape it wished. The company, not the employees, called the meetings of May 24, and, through its ranking supervisors, summoned representatives to

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sen Radio Mfg. Co., 27 N. L. R. B., No. 144. The circuit courts of appeals have been in agreement. E. g. *Hamilton-Brown Shoe Co.* v. *National Labor Relations Board*, 104 F. (2d) 49, 53 (C. C. A. 8); *National Labor Relations Board* v. *Ed. Friedrich, Inc.*, 116 F. (2d) 888, 890 (C. C. A. 5); *National Labor Relations Board* v. *Blossom Products Corp.*, 121 F. (2d) 260, 262 (C. C. A. 3); *National Labor Relations Board* v. *West Kentucky Coal Co.*, 116 F. (2d) 816, 819–820 (C. C. A. 6); *National Labor Relations Board* v. *J. Greenbaum Tanning Co.*, 110 F. (2d) 984, 986–987 (C. C. A. 7), certiorari denied, 311 U. S. 662.

hear the company officials. As the court below held (R. 1012–1013) and as the company has conceded (R. 965, fn. 16), the Independent came into being as an immediate result of these company meetings and addresses of May 24. This in itself furnishes basic support for the Board's finding of domination, interference, and support. For if an employer, rather than his employees, may choose the time, place, and circumstances under which collective organization of his employees shall be born, we think it plain that the employer will await conditions favorable to himself and that the organization which he then causes to be created necessarily will reflect his will rather than that of his employees.

In sum, this is plainly a case where the employer has "intruded to impair [the employees'] freedom"; it follows that the Independent was "not the result of the employees' free choice." *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 587. The Board's findings that the company dominated, interfered with, and supported the Independent, and that thereby, and through the anti-union activities of Superintendent Bishop and Supervisor Edwards (*supra*, pp. 14–15, 28), interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in section 7, are clearly supported by substantial evidence. *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584; *International Association of Machinists* v. *National Labor Relations*

Board, 311 U. S. 72; *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318; *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240.

C. The order requiring the company to disestablish the Independent, and to reimburse employees for Independent dues deducted by the company from their wages, is valid

1. The Board's order required the company to cease and desist from its domination, interference, and support, and to withdraw recognition from and completely disestablish the Independent as bargaining representative (R. 978, 979). The validity of these provisions is not open to question. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271; *National Labor Relations Board* v. *Newport News Shipbuilding and Dry Dock Co.*, 308 U. S. 241, 251; *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 321–322, 333; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 600; *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 521–523; *Westinghouse Electric & Mfg. Co.* v. *National Labor Relations Board*, 312 U. S. 660, affirming per curiam, 112 F. (2d) 657 (C. C. A. 2). Of equally settled validity is the provision (R. 978–979) requiring the company to cease giving effect to its contract with the Independent. *National Licorice Co.* v. *National Labor Relations Board*,

309 U. S. 350, 360–361; *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 75, 81.

2. The Board's order further required the company to reimburse each employee in an amount equal to the dues and assessments deducted from his wages by the company and paid over to the Independent (R. 980). Since the court below rejected the Board's findings in relation to the Independent, it did not pass upon the validity of this provision. Other circuit courts of appeals, under varying circumstances, have refused to enforce similar provisions,[32] although two such courts have indicated that, in appropriate circumstances, a reimbursement provision may be valid.[33] One circuit

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[32] Cases in which the reimbursement order has been refused enforcement although the check-off was accompanied by a closed-shop agreement with a union found to be company-dominated are *National Labor Relations Board* v. *J. Greenebaum Tanning Co.*, 110 F. (2d) 984 (C. C. A. 7), certiorari denied (employer's petition), 311 U. S. 662; *Kansas City Power & Light Co.* v. *National Labor Relations Board*, 111 F. (2d) 340 (C. C. A. 8); and *National Labor Relations Board* v. *West Kentucky Coal Co.*, 116 F. (2d) 816 (C. C. A. 6) (Arant, J., dissenting). Cases refusing enforcement in which the check-off was not accompanied by a closed-shop provision and in which employees individually requested that their dues be checked off are *Western Union Telegraph Co.* v. *National Labor Relations Board*, 113 F. (2d) 992 (C. C. A. 2); *National Labor Relations Board* v. *Continental Oil Co.*, 121 F. (2d) 120 (C. C. A. 10) and *A. E. Staley Mfg. Co.* v. *National Labor Relations Board*, 117 F. (2d) 868 (C. C. A. 7).

[33] *Kansas City Power & Light Co.* v. *National Labor Relations Board*, 111 F. (2d) 340, 348 (C. C. A. 8); *National Labor*

court has withheld decision pending this Court's present determination.[34] The issue is of novel impression in this Court.

We think that, in the circumstances of the present case, it was within the Board's power and discretion to require reimbursement of each employee by the company in the amount of dues which the company checked off his wages and paid over to the Independent. As we have shown (*supra*, pp. 12–42), the Board, upon substantial evidence, found that the company was responsible for the creation of the Independent, and that it interfered with, dominated, and supported that organization. As the capstone of its support, the company quickly granted to its creature a closed-shop contract which, because made with an organization "established, maintained, or assisted" by unfair labor practices, was illegal. Section 8 (3) of the Act; *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72. This contract unlawfully compelled the employees, under penalty of discharge, to acquiesce in the company's selection of their bargaining representative.[35] Concurrently and interrelated with the imposition of this requirement, the

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Relations Board v. *Continental Oil Co.*, 121 F. (2d) 120, 125 (C. C. A. 10).

[34] *National Labor Relations Board* v. *Blossom Products Corp.*, 121 F. (2d) 260 (C. C. A. 3).

[35] Two employees who refused to become members of the Independent were discharged (*supra*, pp. 26–27).

company assured the Independent's financial stability by agreeing with it to deduct and pay over from the wages earned by each employee the amount of his dues in the illegal organization (*supra*, pp. 25–26). No employee could avoid this requirement; the Independent's constitution and bylaws (Bd. Exh. 36, R. 855, 247) expressly provided that each member "shall direct the proper disbursing officer of the Company to deduct the amount of such member's dues from his wages, and pay the same" to the Independent, and that "Any member failing to pay the dues as required" would forfeit his membership. Thereby, of course, under the closed-shop provision, he would also forfeit his employment.

In these circumstances the moneys deducted from the employees' wages and paid over to the Independent were not, in even the remotest sense, voluntary payments by the employees; instead they constituted forced tributes levied upon the employees for maintenance and support of the very instrument by which the company foreclosed any genuine exercise of the rights of self-organization and collective bargaining. Without the semblance of choice on their part, the employees were compelled to forego a portion of their earned wages and to allow the company to withhold it and turn it over to the organization which the company itself had caused to be created. That by this exaction the employees suffered a definite, measurable loss

in wages equal to the amount of the deductions is plain; the loss is as certain as if the company each week had, in violation of section 8 (3) of the Act, discriminatorily laid off the employees without pay for a period equivalent to that in which the deducted wages were earned.

The Board's determination that this wage loss should be borne by the company whose unfair practices caused it, rather than by the employees who were simply the innocent victims, is manifestly reasonable. Upon finding a violation of the Act, the Board, in addition to issuing a cease and desist order, may require an employer to take "such affirmative action * * * as will effectuate the policies of this Act." Section 10 (c); *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177. The dues reimbursement order, in circumstances such as are here present, undoubtedly effectuates the policies of the Act: by returning to the employees what was wrongfully exacted from them, it does no more than to reestablish the status quo. Only thus can there be "a restoration of the situation, as nearly as possible, to that which would have obtained but for the" company's unfair labor practices. *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194; *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 872 (C. C. A. 2), certiorari denied, 304 U. S. 576. In the truest sense the order is "remedial,"

not punitive. Cf. *Republic Steel Corp.* v. *National Labor Relations Board,* 311 U. S. 7.

In short, we submit that withholding part of an employee's wages under such potent compulsion is as direct an injury as a loss of pay caused by a discriminatory discharge and calls as forcibly for an appropriate restorative remedy. In either case the Board is entitled to require the employer "to make good to the employees what they had lost" through the unfair labor practice. *Republic Steel Corp.* v. *National Labor Relations Board,* 311 U. S. 7, 13. In no other way can the employer's unlawful conduct be completely cancelled and the unfair practice eradicated "as from the beginning." *Agwilines, Inc.* v. *National Labor Relations Board,* 87 F. (2d) 146, 151 (C. C. A. 5).

After mature consideration of the problem, the Board has concluded that, in appropriate circumstances, a dues reimbursement provision does effectuate the policies of the Act, and has directed such relief.[38] Under the Act the particular

[38] While, at the time the instant petition for certiorari was filed, it was the Board's practice to direct a like form of relief in all cases in which it found a violation of section 8 (2) of the Act, and in which there was a check-off agreement between the employer and the dominated union (Pet. 26), the practice has since been modified so that the Board now considers each case individually on its own facts and circumstances and on that basis determines whether a dues reimbursement provision is, or is not, appropriate. The Board thus did not direct dues reimbursement in its recent

means by which the effects of unfair labor practices are to be expunged is, as this Court has repeatedly recognized, a matter "for the Board, not the courts, to determine." *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 82; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 600; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271. The Board's determination is final unless arbitrary; it was not arbitrary here. In this case the only means remaining to employees who wished to resist the company's illegal practices, namely, a refusal to pay dues, was removed and, by the combination of the closed-shop and check-off arrangement, the employees were kept firmly bound to the dominated Independent. To say that the Board may not in these circumstances direct reimbursement of the employees for the dues which the company deducted from their wages and paid over to its nominee is to assert that an employer who chooses to establish and maintain an illegal labor organization as a means of forestalling genuine self-organization until such time as the Board can issue an order and the courts enforce it, is free to foist the cost of maintenance upon the employees, without fear that he may be required to refund that cost to them in addition to

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decisions in *Matter of Stehli & Co., Inc.*, 35 N. L. R. B., No. 12; and *Matter of Southern Bell Telephone & Telegraph Co.*, 35 N. L. R. B., No. 137.

ceasing his illegal conduct. The Act impels no such result.

II

THERE IS SUBSTANTIAL EVIDENCE SUPPORTING THE BOARD'S FINDINGS THAT THE COMPANY DISCRIMINATED AGAINST CERTAIN OF ITS EMPLOYEES IN VIOLATION OF SECTION 8 (3) AND (1) OF THE ACT

The Board found that the company discriminatorily discharged Everard M. Mann, A. F. Staunton, Robert E. Elliott, Jr., and T. N. Harrell, Jr., in violation of section 8 (3) and (1) of the Act (R. 969–974). The court below rejected these findings as unsupported by substantial evidence. We think these findings have the requisite support and that the corresponding provisions of the Board's order were, accordingly, entitled to enforcement.

Mann.—Mann was employed by the company as a streetcar operator at Norfolk from July 29, 1936, until his discharge on June 1, 1937 (R. 139, 143, 392). On May 27, Mann walked into the dispatcher's office at Norfolk and, unaware that Superintendent Bishop was there, inquired, "Has anybody seen this guy Bishop?" Bishop, who was in the office reading a newspaper, lowered it, and the dispatcher said, "Mr. Bishop is sitting right over there." Mann looked at Bishop but said nothing and walked out (R. 392). On June 1, Bishop discharged Mann on the alleged ground that Mann had been disrespectful to him (R. 143, 379, 381, 394, 409).

The Board found that this stated ground was but a pretext and that the true reason for Mann's discharge was his union activities (R. 970). Only a short time before his discharge, Mann had taken the lead in opposing the company-favored type of unionism: On May 11, at a meeting of the Norfolk transportation employees held on the company's premises, he had spoken out vigorously against the formation of an inside union, had advocated that the employees join a nationally affiliated organization, and had announced his preference for a C. I. O. union which he joined shortly after the meeting (R. 140–141, 115, 128, 144, 147). Thereafter he had continued to urge his fellow-employees to join a national union (R. 144).

Upon these facts the Board was justified in finding that Mann's demonstrated and strong advocacy of outside unions, not the minor incident in the dispatcher's office, was the true reason for his dismissal. Compare *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 330–333; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 589, 600. Mann's misconduct, if any, was undeniably slight,[37] and the punishment meted out to him grossly disproportionate to the offense. The man who dis-

[37] As the Board noted (R. 970), it is clear that Mann intended no affront to Bishop because his very question revealed that he was unaware of Bishop's presence.

charged him, Bishop, had in the past resorted to a variety of anti-union measures to implement the company's policy of opposition to self-organization.[38] Bishop's subordinate, Supervisor Edwards, was at that very time warning employees that those who kept "messing with the C. I. O." would lose their jobs (*supra*, p. 28). All these circumstances clearly "made permissible the Board's conclusion that [Mann's] activity on behalf of the 'outside' union was the basic cause of his discharge." *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 589. Particularly is that conclusion reasonable in light of the fact that the discharge was timed to occur during the "critical formative" period (*Kansas City Power & Light Co.* v. *National Labor Relations Board*, 111 F. (2d) 340, 349 (C. C. A. 8)) of the Independent when, by providing a telling object lesson to those who might otherwise keep "messing with the C. I. O.," it lent powerful support to the campaign of the inside, company-favored competitor. "Motive is a persuasive interpreter of equivocal conduct". *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 559. The Board's finding that Mann was dis-

[38] Bishop had questioned employees about union activities (*supra*, pp. 14–15), had directly suggested the formation of an inside union (*supra*, p. 35), and was the official to whom the company's labor spy had made his reports (*supra*, p. 14).

criminatorily discharged because of his union activity is, we submit, supported by substantial evidence.[39]

Staunton and Elliott.—The evidence establishes (R. 172–173, 180, 181, 267–268, 858–859, 878, 880), as the Board and the court below concurrently found (R. 970–973, 1017), that on November 4, 1937, in accordance with the closed-shop contract made between the company and the Independent (*supra*, p. 26), the company discharged two employees, Staunton and Elliott, because they refused to join the Independent. Since the Board properly found the closed-shop contract to be illegal for reasons reviewed above (*supra*, pp. 42–43,

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[39] The Board properly refused (R. 970) to credit Bishop's disclaimer of knowledge of Mann's union activities (R. 394); Bishop had long engaged in ascertaining the names and activities of outside union adherents, and his son had been present at the meeting at which Mann so vigorously expressed his union views (R. 476). In any event, the Board "was not required to deny relief because there was no direct evidence that the employer knew [Mann] had joined [the C. I. O.] and was displeased or wanted to make an example of" him. *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 602. The company's further contention at the hearing, that Mann's accident record was a basis for his discharge, is refuted by its official's own testimony that "the real reason * * * was his disrespect," and that except for that he would "probably still be working" (R. 379, 381, 394). Moreover, Mann's accident record was better than that of other operators whose employment continued; other operators cost the company "a great deal more money" over the same period (R. 572); during the period of his employment Mann was deemed responsible for only $63.37 of accidents, a comparatively low figure (Resp. Exh. 46, R. 888a, 571, 816–817).

44), it follows as a matter of law that these discharges were in violation of the Act.[40]

Harrell.—Harrell had been employed by the company since April 1936, when he was hired as a temporary lineman's helper in the Norfolk distribution department (R. 202). His pay was increased by 10 percent in February 1937; the company's records show that he was then considered a "good reliable worker" (Resp. Exh. 24B, R. 879, 366–367, see also R. 170). In August 1937, Harrell was reclassified upward as a third-class lineman and, in addition to the general wage increase granted by the company pursuant to its contract with the Independent, he, together with some others, received a special five-cent-an-hour increase (Resp. Exh. 24C, R. 879–880, 366–367, 384). In November 1937, Harrell was transferred to the company's roll of permanent employees (Resp. Exh. 24D, R. 880, 366–367).

In March 1938, orders were received by the distribution department in Norfolk to reduce its pay

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[40] Section 8 (3); *Corning Glass Works* v. *National Labor Relations Board*, 118 F. (2d) 625, 629 (C. C. A. 2); *National Labor Relations Board* v. *J. Greenebaum Tanning Co.*, 110 F. (2d) 984, 986–987 (C. C. A. 7), certiorari denied, 311 U. S. 662; *Hamilton-Brown Shoe Co.* v. *National Labor Relations Board*, 104 F. (2d) 49, 54 (C. C. A. 8); *Warehousemen's Union* v. *National Labor Relations Board*, 121 F. (2d) 84, 86–87 (App. D. C.), certiorari denied, October 27, 1941, Nos. 627, 628, this Term; see also *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 75, 81; *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 F. (2d) 652, 659–660 (C. C. A. 9).

roll by 10 percent (R. 365, 382). General Foreman May consulted with his superiors, Crafton, superintendent of the distribution department, and Holik, superintendent of light and power (R. 535), and 13 linemen were selected to be laid off on March 31, 1938 (R. 364–365, 521–522). The Board found that Harrell's inclusion among those selected was attributable to his membership in and activity on behalf of the International Brotherhood of Electrical Workers (hereinafter called the Brotherhood), an A. F. of L. affiliate (R. 947).

Superintendent Crafton testified that three factors were utilized in the selection of Harrell and the other employees laid off: "First, seniority; second, their ability; and the third, their dependents", with seniority the prime factor (R. 539, 551, see also R. 365). But disinterested application of these factors cannot account for Harrell's selection. Harrell had greater seniority than five of the eight third-class linemen retained (Resp. Exh. 22, R. 879, 366, 522, 542); his ability was unquestioned;[41] and he had a wife and child

[41] In addition to the evidence of ability reflected upon the company records (*supra*, p. 53), Foreman Tomlinson had specifically requested General Foreman May to assign Harrell to his gang because "he was a good worker" whom he would like to have "as a regular man in the gang" (R. 478). Indeed, Tomlinson had sufficient confidence in Harrell's ability to have him cut in 2,300-volt lines "hot," work normally done by first-class linemen (R. 480–481); May conceded that this was good work (R. 531).

and the added responsibility of paying for a home (R. 208), while it does not appear that any of the five employees retained had corresponding family responsibilities. Accordingly, some other distinguishing factor must have been made the basis of the company's preference of the five employees over Harrell. The evidence points to union activity as constituting this factor.

Harrell joined the Brotherhood on June 25, 1937, and was one of its charter members (R. 203). He actively solicited membership for the Brotherhood, often discussed that organization with his fellow employees, and disparaged the Independent (R. 203, 193, 672). Shortly after a meeting in the company's Cove Street garage at Norfolk, at which the Norfolk distribution department employees voted to form an inside union, Harrell told May, the general foreman, that he disapproved of the plans for a "company union" (R. 210, 217). Harrell later told May that he had joined the Brotherhood; May replied that he saw no reason why a man should join an outside union and that he had never seen any good resulting from such an organization (R. 217–218). Moreover, Harrell, alone of his group, was an outspoken critic of the company-favored Independent, and protagonist of the Brotherhood.[42] In view of the

[42] At the time of the lay-off, the Brotherhood was engaged in an active membership drive in which Harrell was taking a prominent part (R. 204).

company's hostility to outside organizations, the Board reasonably could infer, as it did, that Harrell was selected for lay-off because of his union membership and activities.

In making this finding, the Board rejected (R. 974) the company's contention at the hearing, based largely upon the testimony of General Foreman May (R. 522, 527–528, 531, cf. R. 543, 557–558), that Harrell was laid off because he had a quarrelsome disposition which had caused trouble in the plant. In holding that the Board's finding of discriminatory lay-off is supported by "no evidence" (R. 1017), the court below appears to have held that the Board acted arbitrarily in not accepting May's testimony. But there are various reasons why the Board's action in this respect was not capricious.[43]

First, May's testimony is rather general: that Harrell kept "the men worked up all the time," that "he couldn't get along with" the men, and that he was "keeping a general uproar and dissatisfaction" (R. 522, 527–528, 531). But super-

[43] May also testified that Harrell was laid off for the additional reason that he had not progressed as rapidly as others (R. 522). Since there is ample evidence that Harrell was an apt and able employee (*supra*, pp. 53–54), and was impeded in advancement because of an injury suffered in the company's employ (R. 220), there were sufficient bases for the Board's rejection (R. 974) of this claim. The court below did not mention this questionable part of May's explanation.

visors having direct contact with Harrell presented a contrasting picture. May himself admitted that "most of the foremen liked" Harrell and that Foreman Tomlinson had asked that Harrell be permanently transferred to his gang (R. 527); Foreman Fowler stated that he had never had "a bit" of trouble with Harrell (R. 472–473); and there is undenied testimony that Foreman Tweedy had stated that he "got along fine with" Harrell (R. 187). Second, the principal specific instance of "quarrelsomeness" to which the company points was an altercation between Harrell and an employee named Davenport, which admittedly had its roots in a dispute in which Harrell had engaged at an Independent meeting (R. 220–222, 490–491, 494, 533–534). That Harrell was denied even-handed treatment on this occasion is witnessed by the fact that, without his version's having been ascertained (R. 528–529, 222), he was reprimanded and temporarily forced to change places with a Negro helper as a disciplinary measure (R. 221–222, 488, 520), while Davenport was not cautioned or disciplined in any way (R. 489). Third, Harrell's friction with other employees would not explain his discharge for in similar cases the offending person was transferred to another gang (R. 531–532, 493, 565–566); when Harrell, however, sought to be transferred, his request was refused (R. 530–531).

In short, the evidence did not require acceptance of this explanation advanced by the company. Indeed, at one point in his testimony, Superintendent Crafton admitted that Harrell's attitude did not have "anything to do" with his lay-off (R. 551).

At the most, therefore, the evidence as a whole permitted conflicting inferences, and that "is not enough" to overturn the Board's choice. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, 559–560. See also, *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 304, 307; *National Labor Relations Board* v. *Waterman Steamship Corp.,* 309 U. S. 206, 226; *National Labor Relations Board* v. *Link-Belt Co.,* 311 U. S. 584, 596–597.

Upon the findings of violation of section 8 (1) and (3) of the Act the validity of the Board's order requiring the company to cease and desist from its unfair practices and to reinstate Mann, Staunton, Elliott, and Harrell with back pay, is settled. *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177; *National Labor Relations Board* v. *Link-Belt Co.,* 311 U. S. 584; *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333.

CONCLUSION

It is respectfully submitted that the decree of the court below should be reversed, and the cause

remanded with directions to enforce the Board's order in full except as to its work relief provisions.

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APPENDIX

National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., Supp. V, Sec. 151, *et seq.*):

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organ-

ization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as

will effectuate the policies of this Act. * * *

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(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

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